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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HAROLD G. WHITE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I

When police illegally and in bad faith conduct a wiretap, does subsequent use of testimony derived from that wiretap conflict with *United States v. Ceccolini,* 435 U.S. 268 (1978), *Brown v. Illinois,* 422 U.S. 590 (1975), and the federal wiretap statute (18 U.S.C. §2510 *et seq.*)?

II

Whether the use of the contents of an illegal wiretap in a grand jury proceeding in violation of 18 U.S.C. § 2515 requires a reversal of subsequent convictions arising out of that grand jury's indictment, when the grand jury relied on the illegal evidence in returning its indictment?

III

Whether the failure of the United States Attorney either to inform the judiciary or a grand jury witness of an illegal wiretap until after an indictment was returned against the witness six months after the wiretap terminated, or to cause a wiretap inventory to be served on that witness, requires that the indictment be dismissed and all subsequent convictions reversed?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reproduced as Appendix A hereto. The Order denying petitioner's Petition for Rehearing or Rehearing En Banc is reproduced as Appendix B hereto. To petitioner's knowledge, neither the Opinion nor the Order have been reported.

The Memorandum Opinion of the Honorable James H. Meredith, Judge, United States District Court for the Eastern District of Missouri, is reproduced as Appendix C hereto. The transcript of Judge Meredith's ruling striking three paragraphs of Count I of the indictment is reproduced as Appendix D hereto. To petitioner's knowledge, neither the Memorandum Opinion nor the ruling have been reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 12, 1984, affirming the trial court's judgment (Appendix A). A timely petition for rehearing or rehearing en banc was denied on November 14, 1984 (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and United States Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves petitioner's rights under the Fourth Amendment of the Constitution of the United States as well as under the federal wiretap statute, 18 U.S.C. § 2510 et seq. The Fourth Amendment provides as follows:

> The right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The petition also involves the interpretation and application of the federal wiretap statute, particularly 18 U.S.C. § 2515, which provides as follows:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of the chapter.

Petitioner was charged with felony violations of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 846, and 18 U.S.C. § 1623, the text of which are set out in Appendix E.

STATEMENT OF THE CASE

This case arises from an illegal wiretap set up by five city police officers and two state patrolmen without judicial authority or supervision. The wiretap subsequently was approved and joined in by the county prosecuting attorney. The participants knew that what they were doing was illegal and that they could not use the information they were learning from the wiretap as evidence, but they believed the information gained therefrom would be helpful later.

Information gathered by these officers from the wiretap was provided to and was used by the Drug Enforcement Administration ("DEA"), in conjunction with the United States Attorney's Office in St. Louis, to initiate an investigation against petitioner, whose conversations had been intercepted. DEA used the information to locate and arrest Rey Orta, the person whose telephone had been tapped, to obtain his testimony against petitioner. Orta began to cooperate with DEA against petitioner within minutes of his arrest.

After learning the information from the illegal wiretap and after initiating a grand jury investigation against petitioner, the United States Attorney did not notify either the judiciary or petitioner of the illegal wiretap until after an indictment was returned, six and one-half months after the wiretap began. Petitioner, unaware of the illegal wiretap, appeared and answered questions for the grand jury. He was charged with three technical violations of 18 U.S.C. §1623, one of which was subsequently dismissed by the Court.

Petitioner was convicted on three counts of a superceding indictment (R. 61-79[1]), two counts of which charged him with

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[1] References to "R." are to the Record on Appeal filed in the United States Court of Appeals for the Eighth Circuit.

making false material declarations under oath to a federal grand jury in violation of 18 U.S.C. § 1623. The third count charged a violation of 21 U.S.C. §§ 841(a)(1) and 846 in that petitioner, the Sheriff of Marion County, Missouri, purportedly warned Rey Orta, an unindicted seller of marijuana (the subject of the wiretap), of how to avoid apprehension and conviction by law enforcement authorities.

In April, 1983, five Palmyra, Missouri police officers (the entire department) and several officers of the Missouri State Highway Patrol decided to investigate Orta and those he knew. These officers decided to tap Orta's phone illegally, rather than use standard police tactics (Tr.I 39-40, 43[2]). They knew it was illegal to tap the phone (Tr.I 42-45), and they knew that information they gathered could not be used as evidence (Tr.II 10, 38-39). The wiretap was instituted without judicial authority (Tr.I 48,52; Tr.II 4,39). Although the state troopers were ordered by their superiors to discontinue the wiretap on April 12, 1983 because it was illegal (Tr.I 29-31, 34), it continued for three more days (Tr.I 40). The wiretap began on April 2, 1983, and ended on April 15, 1983 (Tr.I 40).

Initially, seven law enforcement officers and at least one local telephone employee were involved in the wiretap (Tr.I 39-40, 43, 51; Tr.II 7). Subsequently, others learned of the wiretap while it was in operation, including a captain of the State Highway Patrol and two other state patrolmen (Tr.I 26; Tr.II 18), the prosecuting attorney for Marion County, Warren Wells (Tr.I 47; Tr.II 37), the Mayor of Palmyra (Tr.II 17), and the wives of the police officers (Tr.II 25-27). On April 5, 1983, Raymond Chamberlain, Palmyra Police Chief, intercepted a short call in which he recognized petitioner's voice (Tr.I 48). It was then

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[2] References to "Tr." are to the six volume trial transcript; references to "Tr.I" are to the transcript of the pre-trial hearing on November 23, 1983; references to "Tr.II" are to the transcript of the pre-trial hearing on December 30, 1983.

that the police officers told Prosecuting Attorney Wells of the wiretap and of petitioner's apparent relationship with Orta. Pursuant to Wells' planning, a fake search warrant scheme was devised to be part of the wiretap operation (Tr.II 9,24, 39-40). In this scheme, Wells called petitioner to tell him of a future search warrant for Orta, and petitioner's subsequent conversation with Orta was overheard. No search warrant was ever sought. Petitioner, who had conducted four prior major undercover drug operations and who was conducting a similar operation against Orta at the time, knew that no warrant existed and believed he was being tested by Orta and others, including Wells (PX-11(a) (Grand Jury Testimony of Petitioner on October 27, 1983) at 50-56[1]). Orta had told petitioner of having good relationships with other law enforcement officials, and petitioner, at the time, believed Wells could be one of those officials.

At the same time, Police Chief Chamberlain contacted DEA to pass on information about Orta and told DEA about "problems with City Hall" (a reference to petitioner) which he was learning from the wiretap (Tr.I 73-76). He first talked to an agent who told him to obtain more specific information about Orta's activities before DEA would take action (Tr.I 55-56; Tr.II 59-61). Chamberlain complied and eventually provided DEA with information which led to Orta's arrest on April 20, 1983 (Tr.77; Tr.II 10-14, 102). He told DEA not to contact petitioner as there was a problem with him (Tr.II 63,66). Chamberlain also told the Chief of the St. Louis DEA office of the "problems" (Tr.II 73-74). Concurrently, Wells was calling the United States Attorney in St. Louis with the same information, knowing that he could not use it in court (Tr.II 38-39, 43-44). During the initial contacts, Chamberlain was unsure if he told DEA how he was gathering the information, but he did give DEA information from the wiretap (Tr.II 13-14). Excerpts from Chamberlain's testimony are included in Appendix F and Appendix G.

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[1] References to "PX" are to the government's exhibits; references to "DX" are to petitioner's exhibits.

The police and prosecuting attorney gave the information to DEA as part of their efforts to use the information that had been gathered from the wiretap (Tr.I 50). They had decided that the State Patrol would be used to circulate the illegally gained information (Tr.I 53). The goal of the wiretap participants was to turn over the information so it could be used by someone else (Tr.I 50-53; Tr.II 14-15). On April 14, 1983, Major C.E. Fisher, the senior state patrol officer who had ordered the wiretap to stop two days earlier, contacted Henry Pyla, a St. Louis DEA agent, to tell him of a corruption problem and to request DEA's help.[4] It was emphasized that DEA's help was being sought because of the corruption problem and not because of Orta's marijuana sales (Tr.I 26-28, 34). On April 15, 1983, Fisher told both Pyla and Pyla's boss, John Zienter, of the illegal wiretap (Tr.I 27) and of the two intercepted conversations between Orta and petitioner (Tr.I 65-66).

Although DEA had been aware of Orta prior to April 15, 1983, it had never actively investigated him nor did it have a file on him (Tr.I 15, 75, 78; Tr.II 112-14). In fact, as late as June 29, 1982, the DEA agent most familiar with Orta did not even think that Orta had a criminal record, although Orta had already been convicted three times before (PX-2 (Pre-Trial Exhibits)). It was the information gained from the illegal wiretap that initiated DEA's April, 1983 investigation of Orta and petitioner (Tr.I 20). DEA admitted that there would have been no surveillance of Orta had it not learned about petitioner from the wiretap (Tr.II 90-91).

Although the government first took the position that none of the federal agents knew of the alleged link between petitioner and Rey Orta at the time of Orta's arrest (R.82), it turned out that virtually all of those agents knew the material information from the wiretap prior to the surveillance and arrest of Orta

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[4] Chamberlain also talked to agent Pyla on April 14, 1983 (Tr.II 73).

(Tr.II 176,184-86,191,197-98). In particular, Pyla, the agent most familiar with the wiretap information, was in charge of DEA's operation, directed the surveillance, ordered Orta's arrest and arranged for Orta's subsequent deal with the government (Tr.II 81,84-93,96,98). Pyla, an agent with twenty year's experience, admitted that he had no opinion on the legality of that arrest (Appendix G, at A-28), and the government successfully avoided having him answer whether information from the wiretap lead to Orta's arrest (*Id.*). His answers to other questions made it apparent that DEA did use illegally obtained information to arrest Orta.

DEA was in charge of the investigation of petitioner and Orta because of a decision made by the United States Attorney after all of the wiretappers had been questioned by the FBI and DEA (Tr.I 20,58-59,62-63; Tr.II 45-46,56,79-81). The FBI was chosen to investigate the wiretap, and DEA and Pyla were told to proceed against both Orta and petitioner (*Id.;* Affidavit of Edward L. Dowd, Jr., Appendix H). The government's objective was to "sterilize" or "sanitize" the investigation initiated by the illegal wiretap (Tr.I 66; Tr.II 81, 100), in the hope that upon his arrest using the wiretap information, the "natural consequence" would be for Orta to incriminate petitioner and to cooperate against him (Tr.II 102-03). The government used Chamberlain's information from the wiretap, or "investigative leads" as Pyla called them (Tr.I 20), to be at the right place at the right time to arrest Orta and to turn him immediately into a cooperative witness. In fact, as the United States Attorney told the grand jury, the entire investigation began with illegally obtained evidence and DEA was sent out to get Orta in the expectation that he would become a witness against petitioner (Appendix I).

Although the wiretappers were not to be contacted by the DEA agents during Orta's surveillance (Tr.I 67-68,89), at least several of the wiretap participants shared information with the DEA team and offered assistance before and during the

surveillance (Tr.II 179, 197-98). DEA agents established their observation post at 2:00 a.m. on April 20, 1983, in the same house that had been used only days before to monitor the illegal wiretap (Tr.II 125-26). Moreover, even before the surveillance began, DEA requested a customs lookout for Orta on the suspicion that he might smuggle marijuana into the country from Mexico (Tr.II 127-31). This information came to DEA from the wiretap (Tr.II 10-11,13-14,101-02). Chamberlain told Pyla that Orta was going to Texas to pick up some marijuana (Tr.II 20-21). It was this marijuana shipment for which DEA was watching when Orta returned to Palmyra on April 20, 1983 (Tr.77; Tr.II 10-14, 102).

Orta was a thrice-convicted felon and an admitted drug dealer (Tr. 48-50,90-91,93,99,104). Petitioner considered him to be the "number one" marijuana dealer in Marion County (Tr.492,494,499-500,699-700,703). Petitioner had had an earlier undercover operation which targeted Orta as a prime suspect (Tr. 412-14,416-17). According to the DEA witnesses who testified at the pre-trial suppression hearings, Orta voluntarily began to cooperate and to implicate petitioner within minutes of his arrest on April 20, 1983 (Tr.I 90-94; Tr.II 95-96); he was granted immunity for his cooperation within two hours of his arrest (*Id.;* Tr.I 15-16); and he was paid $4,750 in cash by DEA (Tr. 101-03). The government did not call Orta as a witness in either of the two suppression hearings, and he has never been examined regarding the circumstances of his arrest outside the hearing of the jury when questions could have been asked about his knowledge of the wiretap. Orta was the government's principal trial and grand jury witness. A timely motion to suppress his trial testimony was denied (Appendix C).

In cooperation with DEA, after his arrest Orta taped a meeting and several telephone conversations with petitioner. This occurred after the alleged conspiracy between the two had ended (R.1,61). Petitioner, who as Sheriff had a history of successful undercover operations against drug dealers in Marion

County (Tr. 401-02,409-17,485-86,716-17), was trying to undertake his own undercover operation against Orta (Tr. 729-31, 756-61) and was overheard on the wiretap in the process. As others in his department testified, petitioner had been secretive about his prior undercover operations (Tr. 415-17,476-77, 480,485-86,491-92,501-04), and he did not disclose this operation to them until DEA's investigation of him began.

During the grand jury hearings, the government elicited testimony about the fake search warrant scheme designed by the wiretap participants (PX-17(c),p.26; PX-17(e),p.5; PX-17(i), pp.4-5; PX-17(n), pp.27-9; PX-11(a), pp. 11-14,50-56). The grand jury relied on the fake search warrant evidence in returning the indictment (Tr. 448-53), and the indictment included three paragraphs devoted to the search warrant (R.4,64). The trial court ordered those paragraphs stricken on the first day of trial because they related directly to the wiretap (Tr. 9; R.115-18).

Petitioner twice appeared before the grand jury without being subpoenaed. When he appeared, he was unaware of the illegal wiretap. He was never served with an inventory of the wiretap; his first knowledge of the wiretap came when the United States Attorney notified his counsel several days after the indictment was returned.

REASONS FOR ALLOWING THE WRIT

I

This case presents an opportunity for this Court to affirm the espoused principles of the exclusionary rule and to limit and deter bad faith incursions by police officers into the realm of personal freedoms. Petitioner will not restate the long list of cases previously decided by this Court which analyze and define those principles, as the few cases referred to herein adequately state those principles and support the request to grant the petition for a writ of certiorari.

Recent decisions by this Court have modified the Fourth Amendment exclusionary rule so as not to bar the introduction of certain questionably obtained evidence at trial. For example, in *United States v. Leon,* ____ U.S. ____, 82 L.Ed.2d 677 (1984), the Court recognized a good faith exception to the exclusionary rule when evidence is obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, even though that warrant is later found to be invalid. In *Nix v. Williams,* ____ U.S. ____, 81 L.Ed.2d 377 (1984), the Court held that if the prosecution can establish that unlawfully obtained evidence ultimately or inevitably would have been discovered by lawful means, the subject evidence is admissible.

While the Court has emphasized weighing the "benefits" of the rule against the "cost" to the criminal justice system, *e.g., Stone v. Powell,* 428 U.S. 465, 490 (1976), an underlying theme of these decisions appears to rest on the belief that law enforcement agencies and police officers have, by improved training and crime detection techniques, minimized improper constitutional intrusions into the lives of citizens, whether those citizens are law-abiding or are criminal suspects. *See United States v. Leon,* 82 L.Ed 2d at 701-02 (Blackmun, J., concurring). In essence, increased police professionalism has been recognized, and, as a result, marginal or technical constitutional violations

may not lead to the freedom of a suspect, especially when the exclusion of evidence would not efficaciously serve the remedial objectives of the exclusionary rule. *See United States v. Calandra,* 414 U.S. 338, 348 (1974).

The case at bar represents the other side of this situation. Here, the police were not acting in good faith and their transgressions were not minor. They intentionally intercepted wire communications, without consent and without legal authority, as an investigative technique. They knew that the information being gathered could not be used in court, but they hoped that something of value would be learned for later use by a law enforcement agency. Ultimately, the information was given to the federal government to help arrest Orta to use him as a witness against petitioner.

As is briefly discussed below, recent cases which describe the parameters of the exclusionary rule hold that the primary purpose of the rule is to deter willful and significant police misconduct. The opinions of the courts below in the case at bar have ignored and, in fact, have negated this principle. Neither court below weighed the societal cost of this police misconduct, nor was there any analysis of the effects of bad faith conduct on the law enforcement agencies or on the courts.

The relief sought by petitioner in the case at bar fits within the analysis of several decisions by this Court, and within a decision by the Second Circuit Court of Appeals. The opinion of the Eighth Circuit Court of Appeals conflicts with these established cases. In *Brown v. Illinois,* 422 U.S. 590 (1975), this Court made clear that the purpose and the flagrancy of the police misconduct are of particular importance in exclusionary rule analysis. *Id.* at 603-04. Justice Blackmun's opinion stated that exclusion of evidence is appropriate where the illegality was purposeful and related to an "expedition for evidence in the hope that something might turn up." *Id.* at 605. Moreover, as Justice Powell's concurring opinion emphasized, when the evidence

clearly suggests that an illegal arrest is a pretext for collateral objectives, a proffered statement by the subject can only be saved by a demonstrably effective break in the chain of events leading from the illegality to the statement. *Id.* at 610-11 (Powell, J., concurring).

There was no break in the chain of events in the case at bar. From the moment petitioner's telephone call was intercepted, local, state and federal authorities worked together inexorably to make a case against him by sanitizing and using the illegally obtained information (Tr.I 66; Tr.II 81,100). The goal was to arrest Orta and to convince him to provide evidence against petitioner as the "natural consequence" of his arrest. DEA's operation began on April 18, 1983, with a customs lookout based on wiretap information that Orta had gone to Texas to obtain marijuana. The DEA agent who knew the most about the petitioner, Orta and the wiretap was put in charge of the team sent to Palmyra, Missouri to wait for Orta's return, to catch him, and to get him to talk about petitioner. During the intensive surveillance of Orta, DEA agents watched a public phone booth in the court house square to report on the persons using that phone (Tr.II 159-60, 166-71). The wiretap had disclosed that phone booth as a principal location for many people to call Rey Orta (R.120-29). As a result of the knowledge gained from the wiretap, DEA was able to arrest Orta committing a crime it was waiting for him to commit and, within minutes, obtain his help against petitioner.

Live witness testimony which relates to police misconduct is governed by the case of *United States v. Ceccolini,* 435 U.S. 268 (1978). When a live witness' testimony is challenged, there are two salient factors which must be considered: (1) the degree of free will demonstrated by the witness, *id.* at 276-77; and (2) whether the illegal action was conducted for the purpose of uncovering potential witnesses, *id.* at 276 n.4; *id.* at 284 n.4 (Burger, C.J., concurring). In the case at bar, both of these factors favor petitioner.

First, the government never allowed Orta, the live witness, to be examined concerning his free will at either pre-trial hearing. Moreover, the circumstances surrounding Orta's testimony favor suppression under the factors listed by this Court in *Ceccolini.* Orta was a putative defendant, unlike the *Ceccolini* witness, *id.* at 275; Orta's "relationship" with petitioner was not known at all absent the wiretap, unlike the *Ceccolini* witness, *id.* at 279; the police misconduct was flagrantly illegal, unlike Officer Biro's inadvertent discovery in *Ceccolini, id.* at 279-80; and application of the exclusionary rule would have a deterrent effect on future police misconduct, unlike the situation in *Ceccolini, id.* at 280. There is no instantaneous police response to a questionable situation at stake here. The arrest was part of a calculated plan designed by both law enforcement officers and prosecutors, and the officer in charge of the arrest could not state that he believed the arrest was legal.

Orta was not a truly cooperative witness. He was arrested using illegally obtained information. He received immediate immunity and was paid money for his help. Six months later, the govenment helped him with Texas authorities when he was caught with 63 pounds of marijuana (Tr. 99-101). There is no record that Orta was aware of the illegal conception of his arrest when he was convinced to help DEA, nor did he have legal counsel at the time. There is no record to support the conclusion that he voluntarily and freely helped gather information about petitioner with full knowledge of his options.

The second factor in *Ceccolini* — the effect of illegal actions undertaken to gain access to a witness — unquestionably favors suppression. As Chief Justice Burger stated, when an illegal action is undertaken to obtain the name of a witness, "the decision to exclude such testimony should depend on the *officer's* motivation and not on the 'free will' of the witnesses." *Id.* at 284 n.4 (Burger, C.J., concurring). *See also Brown v. Illinois,* 422 U.S. 590, 610 (Powell, J., concurring). In spite of the requirement to analyze the conscious behavior of the police in live

witness suppression situations, neither court below made such an analysis. Therefore, the underlying decision not to suppress Orta's testimony conflicts with the holding of *United States v. Ceccolini.*[5]

Whether illegal monitoring of phone conversations is an unreasonable search or seizure pursuant to *Katz v. United States,* 389 U.S. 347 (1967), or a violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520), suppression of Orta's testimony is also necessary to protect legitimate privacy rights in wire and oral communications and to curtail unlawful interception of such communications. *See* S. Rep. No. 1097, 90th Cong., 2d. Sess., *reprinted in* 1968 *U.S. Code Cong. & Ad. News* 2177, 2185. Moreover, suppression would avoid compromising the integrity of the judiciary when confronted with intentional misconduct. *See Brown v. Illinois,* 420 U.S. at 611 (Powell, J., concurring). Again, the courts below were silent on these fundamental considerations.

Police deterrence and resulting societal benefits have been ignored in this case. In spite of the fact that wiretapping is reprehensible absent strict, impartial judicial scrutiny, the courts below have ignored the responsiblity imposed on them by the Constitution, by Congress, and by this Court. This case can only serve to encourage police misconduct in instances when such misconduct can be "sanitized" and re-used by another law enforcement agency.

What the police did in this case was wrong and our society can benefit only if the police and the prosecution achieve no benefit therefrom. To do less would signal that there are ways

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[5] The Eighth Circuit's decision also conflicts with *United States v. Tane,* 329 F.2d 848 (2d Cir. 1964), wherein a witness' testimony was suppressed at trial because his identity had been discovered by use of an illegal wiretap and his "cooperation" obtained after confronting him with transcripts of the illegally intercepted conversations.

to circumvent prohibitions against illegal police actions and to use the fruits of such police misconduct, and it would provide an incentive for police to affect a witness' will by granting immunity, paying money and similar actions, rather than providing an incentive to avoid the initial constitutional violation. The focus of the judicial inquiry will have shifted from an analysis of the constitutional violation itself, to a less manageable analysis of the witness' free will in the face of police inducements to cooperate and testify.

Petitioner respectfully suggests that certiorari should be granted as to this Question, not only to resolve the conflict between the lower courts and this Court's prior opinions, but to provide guidance to police and others as to the type of misconduct toward which the exclusionary rule and 18 U.S.C. § 2515 are directed.

II

Petitioner further contends that the grand jury received both the contents of illegally intercepted wire communications and evidence derived therefrom, contrary to the edict found in 18 U.S.C. § 2515. As was discussed above, Orta's testimony, both before the grand jury and at trial, was evidence derived from the illegal wiretap. As such, the statute prohibits its reception in either setting.

In addition to Orta's testimony, the grand jury heard and relied on evidence which represented the contents of the illegal wiretap. The grand jury heard government counsel question petitioner and others about the fake search warrant which the wiretappers designed to be overheard as part of their wiretap (PX-17(c), p.26; PX-17(e), p.5; PX-17(i), pp.4-5; PX-11(a), pp. 72-74). The grand jury relied on this evidence of the fake search warrant scheme in its deliberations (Tr. 448-51), and three of the paragraphs of the indictment specifically related to this scheme (R.64). Although the trial court ultimately struck those paragraphs of the indictment (Appendix D), the statute had

already been violated and the indictment related to this improper evidence.

This case presents a particular issue of first impression and requires an analysis of the purpose of 18 U.S.C. § 2515 to describe the remedies inherent therein. Petitioner believes that the improper introduction of this evidence tainted the grand jury proceedings such that the indictment should have been dismissed. Otherwise, the statutory prohibition has no meaning because it has no remedy. It is clear that 18 U.S.C. § 2515 plays a central role in the statutory scheme and that a dismissal of the indictment is the only meaningful remedy available. *See United States v. Giordano,* 416 U.S. 505, 527-28 (1974). Moreover, the statutory prohibition against the use of this type of evidence in a grand jury hearing overcomes the general admissibility of certain illegally obtained evidence recognized in *United States v. Calandra,* 414 U.S. 338 (1974).

Petitioner respectfully requests that the Court grant certiorari for this Question on the grounds that a violation of 18 U.S.C. § 2515 in a grand jury hearing requires a reversal of subsequent convictions and a dismissal of a resulting indictment.

III

Although the underlying misconduct in the case at bar was undertaken by the police with assistance from a state prosecutor, further failures by government counsel compounded this misconduct to petitioner's prejudice. The United States Attorney's office became aware of the illegal wiretap in mid-April, 1983. In spite of this knowledge, petitioner was not informed of the illegal wiretap until late October, 1983, after he was indicted and after he twice appeared before the grand jury. It was at this time that the United States Attorney first notified the district court of the wiretap.

The government's failure to timely notify petitioner of the illegal interception of his wire communications prejudiced him.

Two extremely technical perjury counts were the result of petitioner's grand jury testimony. These counts related to petitioner's recollections of the names of people that he talked to about Orta and his investigation. Certain people did not recall such discussions, but others testified that they remembered such discussions. Absent timely notification of the illegal wiretap, petitioner was unable to make a fully informed decision whether or not to offer grand jury testimony. He certainly would not have testified without having full information about the wiretap.

Congress established a procedure whereby an inventory is to be served on certain persons whose wire communications have been intercepted. 18 U.S.C. § 2518(8)(d). This requirement applies even under circumstances where the interception occurs before the government applies for and receives an order approving the wiretap. Whereas the wiretap in the case at bar was so illegal that it does not fit squarely within the meaning of 18 U.S.C. § 2510 et seq., and therefore presents a case of first impression, the clear intent of Congress was to provide timely notification of a wiretap to a certain class of people, including a potential defendant such as petitioner. Moreover, Congress intended that there be judicial oversight throughout the wiretap proceedings. *See* 18 U.S.C. §§ 2516, 2518.

The government's failure to notify the court of the illegal wiretap until after the indictment was returned precluded a meaningful judicial determination of petitioner's right to be notified of the wiretap prior to his grand jury testimony. There can be no doubt that notification of wiretap was a central theme of the statutory scheme, and this Court must fashion an appropriate remedy for a violation thereof, especially when it prejudiced petitioner and led to two additional charges being levied against him. *See United States v. Giordano*, 416 U.S. 505, 527-28 (1974).

A witness cannot be compelled to answer questions in a grand jury hearing if the questioning arises out of or relates to an il-

legal wiretap. *See Gelbard v. United States*, 408 U.S. 41 (1972). Obviously that witness must be informed of the illegal wiretap in order to be able to exercise the right. It is the goal of the federal wiretap statute to allow a person the opportunity to exercise that right. The government's silence prevented this from happening.

Petitioner respectfully requests that the Court grant certiorari for this Question both to enforce the principles inherent in the federal wiretap statute and to explicitly set forth the notice requirements of that statute.

CONCLUSION

For the above reasons, it is respectfully submitted that the Court grant the petition for a writ of certiorari for each of the Questions presented.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1331

United States of America,
Appellee,

v.

Harold G. White,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: September 12, 1984
Filed: October 12, 1984

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

PER CURIAM.

Harold G. White, the Sheriff of Marion County, Missouri, appeals his jury conviction of conspiracy to distribute marijuana in violation of 21 U.S.C. §§ 846 and 841(a)(1) and two counts of perjury before a grand jury, in violation of 18 U.S.C. § 1623. White claims that an admittedly illegal wiretap, placed by state authorities, tainted the federal indictment and proceedings against White. We find the evidence against White had a source independent of the constitutional and statutory violations, therefore we affirm the conviction.

Rey Orta was a suspected drug dealer in Marion County, Missouri. In the spring of 1983 Orta resided in Palmyra. A

number of law enforcement agencies were interested in investigating and prosecuting Orta. Between April 2-15, 1983, the Palmyra Police and two state troopers, with the aid of a friend at the local telephone company, tapped Orta's telephone. The tap was instituted without judicial authority and all parties admit its illegality. *See* 18 U.S.C. § 2510-2520 (1982). The tap confirmed Orta was dealing marijuana. In addition, two calls from defendant White were intercepted.

At the time of the calls, White was the sheriff of Marion County and had held that post for seven years. The heart of the factual dispute was whether White conspired with Orta to distribute marijuana, as the government claimed, or whether, as White claimed, he was conducting an undercover operation against Orta. At trial, the jury concluded there was an illegal conspiracy.

On or about April 12, Major C.E. Fisher of the Missouri State Highway Patrol became aware of the illegal tap and ordered it stopped immediately. Subsequently, the Drug Enforcement Administration (DEA) and FBI were contacted and informed of the illegal wiretap, the drug dealer, and a possibly corrupt sheriff. DEA already had a file on Orta and had previously attempted to investigate him. On April 19, while the FBI began investigating the wiretapping, DEA undertook intensive surveillance of Orta's home. The FBI sealed the wiretap recordings and state involvement in the investigation of Orta ceased. Although DEA's supervisory agent, Henry Pyla, knew of the wiretap and information gained from it, the agent in charge of surveillance, Timothy Brunholtz, was unaware of the wiretapping.

Orta returned from Texas with a load of marijuana on April 20. The DEA team observed him meeting various people in an alleyway and abandoned gas station in Palmyra. The meetings had all the indicia of drug transactions. Finally, in the city park, the agents observed Orta transferring two large bags from

a car he was driving to another person's van. The DEA team, believing they had probable cause, stopped the van and the car, arrested Orta, and conducted a search. Approximately twenty pounds of marijuana were found in the bags. Orta was given his *Miranda* rights and Agent Brunholtz, in keeping with his regular practice, asked Orta if he would cooperate with the investigative authorities. Orta indicated that he had information about Sheriff White and would provide it if he received assurances he would not be prosecuted. That evening the United States Attorney decided not to prosecute Orta in exchange for his cooperation in an investigation of Orta's sources of supply and Sheriff White.

White was eventually indicted by a grand jury for conspiracy to distribute marijuana and perjury in connection with his testimony before the grand jury. The government's principal witness at trial was Orta. On appeal, White asserts that both the indictment and Orta's testimony were a direct result of the illegal wiretap. White asks that the indictment be dismissed or Orta's testimony be stricken. White also complains that he was not informed of the illegal wiretap until after the indictment. Furthermore, White claims the government introduced evidence from the wiretap to the grand jury in violation of 18 U.S.C. § 2515 (1982). Finally, White asserts that the statements he made to the grand jury which formed the basis of the perjury charges were not material.

There is no question the wiretapping by state officials violated both the fourth amendment and 18 U.S.C. § 2511. The exclusionary rule, first employed in *United States v. Weeks,* 232 U.S. 383 (1914), prohibits the use of evidence obtained in violation of the fourth amendment. Furthermore, evidence derived from illegally obtained evidence is generally inadmissible. *Nardone v. United States,* 308 U.S. 338, 340-41 (1939). However, evidence obtained from a source independent of the misconduct is admissible. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920).

Although DEA had previously expressed some interest in Orta, the April 20, 1983 surveillance was triggered by the wiretapping activity of the state officials. However, the arrest of Orta was based on probable cause established by the DEA surveillance team, not the illegal wiretap. For this reason, the concerns expressed in *Brown v. Illinois,* 422 U.S. 590 (1975), and *Wong Sun v. United States,* 371 U.S. 471 (1963), about the admissibility of an arrestee's subsequent statements are not present. The valid arrest of Orta, independent of the wiretap, resulted in Orta becoming a government witness and initiated DEA's investigation of White.

Orta's cooperation with DEA and testimony at trial was voluntary and with full knowledge of his fifth amendment rights. *United States v. Ceccolini,* 435 U.S. 268 (1978), admonishes us to be wary of excluding free-will testimony of a live witness. It is arguable, despite DEA's previous knowledge of Orta, that the illegal wiretap led to his discovery as a witness against White. But the Supreme Court has noted "the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify." *Ceccolini,* 435 U.S. at 277. This is such a case. We hold that the evidence used by DEA to indict and convict White arose independently of the wiretap. For this reason the indictment was not tainted by the fourth amendment violation and Orta's testimony was properly admitted at trial.

We have examined White's other claims and find them without merit. The government was under no duty to disclose the existence of the illegal wiretapping to White before he was indicted. It does not appear that the government disclosed any information from the wiretaps to the grand jury. We also find that the statements to the grand jury which formed the basis of the perjury charges were directly relevant and material to the grand jury's investigation.

The judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1331-EM September Term, 1984

UNITED STATES OF AMERICA,
Appellee,

vs.

HAROLD G. WHITE,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 14, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. S1-83-219 Cr (C)

United States of America,
Plaintiff,

v.

Harold G. White,
Defendant.

ORDER

(Filed January 26, 1984)

A memorandum dated this day is hereby incorporated in and made a part of this order.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion to dismiss the indictment because it is tainted as a result of an illegal wiretap is denied.

DATED this 26 day of January, 1984.

/s/ J. H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. S1-83-219 Cr (C)

United States of America,
Plaintiff,

v.

Harold G. White,
Defendant.

MEMORANDUM

(Filed Jan. 26, 1984)

This matter is pending on motion of the defendant to dismiss the entire indictment for the reason that the information against White was initially obtained as a result of an illegal wiretap placed on the phone of Rey H. Orta, a known drug dealer in Palmyra, Missouri, and that the entire investigation against White is tainted as a result of this initial beginning. The motion will be denied for the reasons stated below.

On April 2, 1983, Raymond W. Chamberlain, Police Chief of Palmyra, Missouri, along with four other officers and two state patrolmen set up a wiretap on the phone of Rey Orta with the help of a telephone repairman and began monitoring the telephone. This wiretap continued from April 2 until April 15, 1983, when Major Fisher advised that the telephone tap was illegal. The tap was discontinued on April 15, 1983.

On April 7, 1983, the Chief of Police of Palmyra advised Warren Wells, Prosecuting Attorney for Marion County, of the tap on Rey Orta's telephone and played for Wells a tape of Orta talking to Sheriff White. Wells and Chamberlain decided to set up a fake warrant and Wells advised Sheriff White that a warrant would be issued to search the premises of Orta the follow-

ing day. White immediately called Orta and advised him of the search warrant coming the next day. This was heard on the telephone tap. The prosecuting attorney, Wells, was aware that information obtained from the telephone tap was inadmissible as evidence. He was not aware that it was a violation of federal law. On April 19, 1983, Wells brought the tapes to St. Louis. He was accompanied by Agents Moss and Hagan of the Federal Bureau of Investigation (FBI) and a Drug Enforcement Administration (DEA) agent. They met with U.S. Attorney Dittmeier and Assistant U. S. Attorney Dowd. The tapes were turned over to the FBI and sealed. The U. S. Attorney advised that an independent investigation would have to be started against Orta in order to prosecute him. On April 19, 1983, the Missouri State Highway Patrol, the Drug Enforcement Administration, and the Federal Bureau of Investigation met with the U. S. Attorney. At that meeting it was decided that DEA would investigate Orta and the FBI would investigate the telephone taps. While the parties did not listen to the tapes, they were aware that the Sheriff of Marion County, White, had been in touch with Orta and had given him information. Henry D. Pyla of the DEA, on April 19th, told Timothy A. Brunholtz to set up headquarters in Quincy, Illinois and start a surveillance on Orta in Palmyra. On April 19, 1983, Brunholtz left with six DEA agents. He was unaware of the telephone taps and unaware of the fact that Orta had been in contact with White. A surveillance was set up on Orta in Palmyra. A vacant house was obtained across the street from Orta's residence. Brunholtz obtained the address of Orta by checking with the U. S. Postal Service and the telephone companies. Pyla went up there on April 20, 1983. The surveillance was already set up. The agents on the surveillance observed Orta selling drugs and they had probable cause to arrest Orta without any reference to the telephone taps or any other information but merely their own observations of him engaged in selling drugs. Orta was arrested at approximately 7:10 p.m. on April 20, 1983 by Brunholtz. Immediately after his arrest Orta told Brunholtz that he was paying

off Sheriff White $1,000 a month and, if they would forgo prosecuting Orta, he would cooperate in their investigation of White. The DEA agents contacted the U. S. Attorney and told him of Orta's willingness to cooperate provided he was not prosecuted and that he would cooperate in attempting to get information about White. By 8:30 p.m. that evening, the U. S. Attorney had agreed to not prosecute Orta and to seek his cooperation against White. From that point on the focus of the investigation was against White and a number of telephone calls between Orta and White were recorded with the consent of Orta.

Two hearings have been held on this motion, one on November 23, 1983 and the other on December 30, 1983. Extensive testimony was taken from all parties involved in this operation. The evidence shows that there was some mention of White's connection with Orta while the DEA agents were in Quincy and before the surveillance was set up. However, the thrust of the investigation by DEA was against Orta; and after Orta was observed selling drugs and arrested, he immediately tried to extricate himself by involving White. At that point after an arrangement was made with the U. S. Attorney, White started to be investigated.

The test for admissiblity of evidence, such as the testimony of Orta in this case, is found in *Wong Sun v. United States of America,* 371 U.S. 471, 488 (1963): whether the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. If the evidence is obtained from an independent source, it may be admitted. *United States of America v. Schipani,* 414 F.2d 1262, 1266 (2d Cir. 1969). In defendant's memorandum filed December 5, 1983, he states that the DEA knew of Orta a year and a half prior to April, 1983. Investigation was begun as early as April, 1982. The wiretap was conducted in April, 1983. Not only is it likely that the government would have launched its

own investigation and found Orta, even if no information had been received from the illegal wiretap, but it is clear that the government had actually been investigating Orta and in all likelihood would have continued the investigation since, as defendant states, Rey Orta was known to all law enforcement agencies as a heavy drug runner.

In this case, it was shown that the government alreay knew of Orta and was trying to catch him; therefore, he was already targeted as a source of possible information. The government was trying to arrest Orta before the tapes were ever made. Orta's freely giving evidence implicating White came not from the illegal wiretaps but from his arrest; therefore, the connection between the tapes and Orta's implication of White is attenuated, especially when the Court views the probable cause to arrest Orta without reference to the tapes. Orta volunteered the information when arrested; and it was clear that the DEA had decided to go forth with its investigation in hopes of arresting Orta, not White. Orta's bargain, a result of his arrest, would have come forth whether or not the wiretap was ever made. The wiretap was not discussed with Orta, nor was it a reason for his bargain.

Next, the Court considers the degree of free will involved in Orta's decision to implicate White. This consideration is applicable when challenged statements are made by a putative defendant after arrest. *United States of America v. Ceccolini,* 435 U.S. 268, 276 (1978). The greater the willingness of the witness to freely testify, the greater the likelihood that he will be discovered by legal means. *Id.* The Supreme Court notes that the free will of the witness is especially important in admitting the evidence where the search was *not* conducted by the police for the specific purpose of discovering potential witnesses. 435 U.S. at 2768 n.4. Here, the search was not conducted in order to discover a witness, but to get Orta himself.

That Orta was later caught committing an offense, providing a basis for his decision to cooperate and volunteer information,

is also a factor in allowing such evidence to be used. *United States of America v. Leonardi,* 623 F.2d 746, 753 (2d Cir. 1980). Orta's existence, identity, and potential value as a witness were established prior to the illegal wiretap and hence, the record supports the determination that Orta's cooperation was obtained independently of the illegal search. *Leonardi,* 623 F.2d at 752. The suppression of Orta's testimony would have no appreciable deterrent effect because the wiretap was not conducted in order to obtain evidence of Sheriff White being paid off by Orta, but to obtain evidence against Orta alone.

The main purge of the primary taint is Orta's immediate willingness to testify against defendant White. All law enforcement officers knew Orta was involved in drugs. It was natural to watch him; and once he was caught in the middle of an illegal act, he tried to lessen the blow on himself by freely offering information he had on White. Orta's cooperation breaks the chain of causation between the illegal wiretap and the subsequent evidence sought to be excluded. *See United States of America v. Hooten,* 662 F.2d 628, 633 (9th Cir. 1981) (*Ceccolini* does not apply only to good citizen witnesses who testify out of civic duty); *United States of America v. Brookins,* 614 F.2d 1037, 1043 (5th Cir. 1980) (witness testimony was attentuated [sic] from police misconduct, and properly admitted); *United States of America v. Mullens,* 536 F.2d 997, 999-1000 (2d Cir. 1976) ("but for" reasoning of connection between illegal search and voluntary testimony of found witness is rejected). *Cf. United States of America v. Apker,* 705 F.2d 293, 306 (8th Cir. 1983) (inevitable discovery exception). Defendant argues that Orta testified only because of the predicament in which he found himself and that he would not have been found but for the illegal wiretap. As the Court notes above, Orta was under DEA investigation long before the wiretap. And were the Court to adopt the "but for" reasoning of defendant, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind. *Mullins,* 536 F.2d at 1000 (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 224 (1973)).

Despite the fact that the government first knew of White's activities as a result of the illegal wiretaps, the evidence of defendant's guilt comes solely from outside sources. Orta's testimony came not from the wiretap but from his intimate knowledge of the operation in which he participated. The testimony of Orta constitutes an independent source, sufficiently attenuated from the illegal wiretap as to dissipate the taint thereof. *See United States of America v. Houltin*, 566 F.2d 1027, 1032 (5th Cir. 1978). In admitting the evidence, the Court realizes the observation made in *Ceccolini*, 435 U.S. at 279. A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule. The penalties visited upon the government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.

The Court is of the opinion that the prior information received about White and Orta on the illegal telephone taps did not taint the investigation and that the information obtained concerning White was obtained independently of the the use of the illegal wiretaps. Accordingly, the motion to dismiss the indictment will be overruled.

DATED this 26 of January, 1984.

/s/ J. H. Meredith
United States District Judge

APPENDIX D

Trial Transcript pp. 4-12, February 6, 1984

MR. QUINN: Judge, on the other motion in limine, this relates to Count No. I of the indictment and particularly to Paragraphs 13, 14, 15, the phony search warrant scheme of Prosecuting Attorney Wells. As we've set out in the motion, it is quite clear that the contents of the illegal taping cannot come into the evidence in this Court, the contents, the words themselves from the taping. That's what the law says. It doesn't talk about who is going to talk about it, it says the contents of that conversation cannot come in.

In addition, the whole scheme itself derived out of listening to illegal tapes and the Court has already ruled on that ground, that the matters in those tapes should not be brought into this courtroom, and if the Court allows Paragraphs 13, 14, 15 in the indictment, and allows in any discussion about the events that arose out of that phony search warrant, it would be allowing in both the poisonous tree itself and the fruits of the poisonous tree.

THE COURT: I thought we went into that pretty well in motions you already filed.

MR. QUINN: Judge, I believe the motions we filed—this motion concerns one aspect of the charges brought by the government. It only deals with the March 7th, 8th, and 9th time period while the illegal taping was going on. The other aspects of the —April, I'm sorry, Judge, April of 1983. What the Court's ruling, in my estimation, and I did not see any part of that memorandum which dealt specifically with allowing in that evidence, and the Court had already ruled that the evidence from the illegal taping—

THE COURT: Well, obviously, the tapes can't come in, no question about that. Now, what else do you want to strike out?

MR. QUINN: Judge, 13, 14, 15, which are the contents of those tapes. They are the fruits of those particular tapes. The other aspects of the charge, they can certainly raise it themselves. In addition, we would be put at a great disadvantage because there would be no way to cross-examine either Mr. Orta on his recollection, or Mr. Wells, or any of the other people who set up a phony search warrant scheme.

MR. DOWD: Your Honor, it's the government's position we did not ask Sheriff White any questions in the Grand Jury about the time when he warned Orta about a search warrant. He came into the Grand Jury and gave the Grand Jury an alleged report dated April 30th of 1983, and in that report—he was using it in an exculpatory way. He's saying I couldn't trust Warren Wells, and Warren Wells called me and told me about a search warrant and I called and warned Rey Orta about the search warrant in order to test Warren Wells. We got that directly from the defendant, which he was using in an exculpatory way, and that's the first time we ever got into that in the Grand Jury.

And it is our position that under Longson versus United States and U. S. versus Shupani, that the evidence has been obtained by means which are sufficiently distinguishable from the initial charge and that they are obtained from an independent source, which is the defendant himself, and the defendant's reports.

MR. QUINN: Judge, I might comment on that. I want to know is the government saying that it had asked no other witnesses before the time that Harold White came in, anything about the search warrant aspect of this case and warnings? I believe that I have seen testimony from Mr. Orta that were taken on April 27th, almost a month before Sheriff White went in, some questions, where some questions and information was derived. But if the government wants to go on record saying that it has not gone into those aspects prior to Sheriff White testifying, I'd like to hear it now.

MR. DOWD: Your Honor, it is my recollection that we did not go into that with Mr. Orta until his second Grand Jury appearance. However, Mr. Orta's recollection of that incident would also be independent of the wire tap. Clearly, he was not in any way involved in that wire tap. It was something that he knew independently of the wire tap, that he knew only because the sheriff called him and warned him.

THE COURT: Let me see what Paragraphs 13 and 14 do say.

Isn't 13, 14, and 15 directly from the—to prove those, they have to prove the illegal wiretap, isn't that right?

MR. DOWD: I wouldn't have to prove the illegal wiretap, Your Honor. I intend to prove that through the defendant's Grand Jury testimony, relating to his report which he submitted to the Grand Jury, saying that he had warned Orta about a search warrant coming, and he offered that report to the Grand Jury to exculpate himself from—

THE COURT: Let me see the Grand Jury thing.

MR. QUINN: By Sheriff White, Judge?

THE COURT: Yes. Let me see specifically what you're talking about in the Grand Jury.

MR. QUINN: Judge, if it's the April 30th report he's making, actually that was a work product document which was prepared for us.

MR. MAYER: From me.

MR. QUINN: Which was turned over to the government. It was after we had already contacted the U.S. Attorney's office in this case.

MR. DOWD: Your Honor, they can call it whatever they would like to, but it was provided to us, and it was provided to us by Dan Campbell, as well, who is a deputy sheriff working for Sheriff White, and the sheriff gave it to him and said,

"Here, I want you to be aware of my investigation of Rey Orta," after the defendant had been in the Grand Jury. If there's any question about this, the next day he gives this to Campbell. Campbell then provides it to us as did the defense lawyers. If there's any work product privilege it was certainly waived.

MR. QUINN: Judge, on Dan Campbell turning it over, I think the evidence would be that Dan Campbell had a sealed envelope, did not read the contents of that envelope and I think—

THE COURT: Well, I'm going to grant this motion. We'll strike Paragraphs 13, 14, and 15.

MR. QUINN: Judge, so that the Court's clear, there were other requests in there as far as not only striking the paragraphs and dismissing that aspect, but excluding that from evidence in the Court.

THE COURT: What?

MR. QUINN: Excluding that subject matter from evidence in the Court, as well as dismissing it from the indictment. That was the other part of the motion.

THE COURT: Well, if it comes from any other source I'm not going to exclude it, but I'm going to strike those three paragraphs from the indictment. In other words, if it doesn't come to taps it doesn't make any difference. I don't see how it's essential, though, to any of your lawsuit if you strike the paragraphs.

MR. DOWD: You mean striking them from the indictment?

THE COURT: Yes.

MR. DOWD: No, it doesn't hurt the indictment.

THE COURT: So they are out of the indictment.

MR. QUINN: Judge, I would just point out, though, I think the evidence itself must also be excluded according to the statutory provision. It says no evidence can come in, no evidence derived therefrom, the contents of them cannot come in.

THE COURT: Well, if we strike them, then that takes care of the evidence, doesn't it?

MR. QUINN: I would think.

THE COURT: About those three paragraphs.

MR. DOWD: Are you saying we can't put on any evidence relating to the sheriff warning Orta about a search warrant coming?

THE COURT: What's the point in it?

MR. DOWD: It shows how corrupt the defendant was. Your Honor, we have some telephone tolls from the Ramada Inn in Quincy, where after the defendant warns Orta about the search warrant, he then cleans up his house and leaves his house and goes to stay at the Ramada Inn. He then makes several calls to the defendant, and we would like to prove those calls just to show his contacts with the defendant in April of 1983, since the defendant at times has denied having significant number of contacts with the drug dealer.

THE COURT: What is the Grand Jury testimony? You're going to show me that. Let me see that where you're talking about what you wanted to get in. What is it you want to get in?

MR. DOWD: Special Agent Brunholtz went to get it, Your Honor, but basically it says yes, I wrote a report that says that I warned Orta about a search warrant, I did this because Warren Wells called me and told me there was a search warrant that was going to take place at Orta's house, and I didn't trust Warren Wells. I thought this was unusual for him to talk to me about a search warrant, so I called Orta and told him that people were

coming with a search warrant, I called him and told him mayday, and mayday meant law enforcement was coming, clean up and get out.

THE COURT: That's what he testified to before the Grand Jury?

MR. DOWD: Yes, and testified to it—I only asked him questions about it because of a report provided to us from the defendant, which lays out this warning about a search warrant.

MR. QUINN: Judge, if we have to get into the search warrant, the search warrant was the poisonous tree itself.

THE COURT: I'm going to eliminate that from the testimony period.

APPENDIX E

Statutes Involved

18 U.S.C. § 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

> (1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of

this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . . .

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX F

Excerpts from Pre-Trial Hearing, November 23, 1983

Witness: Chief Raymond Chamberlain,
(Police Chief, Palmyra, Missouri)

Tr.I 42

Q: You had no knowledge that it was illegal to tap a person's phone?

A: I had no idea it was a federal law.

Q: Did you know it was illegal to tap a person's phone?

A: Yes.

***

Q: Yet on April the 2nd you set up a tap on Rey Orta's phone?

A: Yes, sir.

Tr.I 43

Q: . . . There are four officers and the State Highway Patrolmen. Was there anyone at that meeting that advised to tap a person's phone was illegal?

A: No, sir, I don't believe so.

Q: Well, you knew it was illegal.

A: Yes, sir.

Q: Was it brought up that it was a violation of federal law?

A: No, sir. When we put it on, I didn't take—I wasn't aware of federal law. I was thinking more on the local law.

Q: Well, you knew it was illegal there, too?

A: More than likely.

Tr.I 47-48

Q: And from the 2nd until the 15th, while this electronic surveillance was in place, who did you disclose the information to that was secured?

A: Oh, we went to our Prosecuting Attorney on the 7th.

***

Q: Did he advise you to discontinue the electronic surveillance at that time?

A: No, sir. We went ahead with it.

Q: Did he tell you to go ahead with it?

A: Yes, sir.

Q: So, you were doing this with the approval after the 7th of Warren Wells, the Prosecutor?

A: Yes, sir.

Tr.I 50

Q: Did you have any further conversation after the 7th with Warren Wells concerning this tap?

A: On several occasions, just talking about, what we was going to do and, you know, just brief conversations.

Q: Well, what were those conversations?

A: Well, how, after we thought it was Harold White that was tipping him that we were there, what we was going to do with the tapes, or how did he go about using them.

Tr.I 52-53

Q: Was there any decision or was there any meeting of the minds with Warren Wells how these taps were going to be used?

A: Yes. There was considerable talk about them.

Q: All right. What was that?

***

A: Yes. What we was going to do with the tapes, yes, sir. We talked to the whole group, just confront Sheriff White with it, where to go with it, you know, what to do with them and then later the two State Patrolmen said the best thing would be to go through [the State Patrol], not actually with the tapes, but they went to them and talked to them.

Tr.I 53-54

Q: And did you mention the tapes to [the DEA agents], the information you had from the tapes?

A: No, I told them we was getting information on it. I didn't tell them how we was getting it.

Q: But you told them you had information concerning Orta—

A: Orta

Q: (Continuing)—to the DEA agent?

A: Yes, sir.

APPENDIX G

Excerpts from Pre-Trial Hearing, December 30, 1983

Witness: Raymond Chamberlain
(Police Chief, Palmyra, Missouri)

Tr.II 4

Q: You had no previous authority from anyone including the Prosecuting Attorney or any government, United States government, officials to put this tap on, did you?

A: No, sir.

Tr.II 9-10

Q: And after Warren Wells heard the tape, what was the conversation between you all at that time?

A: We were all quite upset and we sat and talked about it and then we decided we would see if the Sheriff was working with them, with Orta, or had some dealings, other dealings, with him; and we decided to set up a fake search warrant which we also implemented and called Sheriff White and then later on that evening we had our second tape of Sheriff White calling Orta and telling him that there was a warrant.

***

Q: Did [Wells] tell you that it was illegal to tap a person's line like that without, not only illegal, but unlawful to tap a person's phone like that without having a court order?

A: We talked about, possibly talked about that, because I do remember that we cannot use anything on these tapes in court.

Tr.II 10-11

Q: You had previously been contacted by DEA, hadn't you?

A: No. I contacted DEA.

Q: When was that?

A: I contacted them around the 3rd and the 4th of April.

***

Q: And exactly what did you tell [DEA]?

A: I told [DEA] [Orta] would be coming in on a flight and if [DEA] could get dogs or something out there, but I never could get what flight he would be coming back on.

Q: Did you tell [DEA] where you got the information?

A: I don't know if I told [DEA] where I got the information.

Tr.II 13

Q: All right. After you had the conversation with DEA Agent Patterson, was that followed up later by any other conversation with him?

A: I think about a week later I had contacted him.

Q: That would be about the 9th?

A: Somewhere, about a week later from—and where they were supposed to be another trip to Texas.

Q: Where did you get that information?

A: I got that off the phone.

Q: All right. And who did you talk to and give that information to?

A: I think I talked to Patterson again.

Tr.II 14

Q: And it's your testimony that up until the time Major Fisher [State Patrol] brought this to the attention of DEA that you never told them where you were getting this information, or you don't remember?

A: I don't think I ever did, sir.

Q: You don't know? But you were giving him information, is that right?

A: Yes.

Q: That was secured from the illegal tap?

A: Yes.

Q: ...Let me ask you: How many times between the—I believe you said the 5th, 3rd or 4th or 5th of April, the time you took the tap off, how many conversations did you have with the DEA?

A: I may have had a couple.

***

Q: Two more. And you were advising DEA of the information you were securing from this tap?

A: Yes, on Orta.

Tr.II 19-21

THE COURT: When were [the tapes] picked up, do you remember?

THE WITNESS: I was—I think they were picked up around the 19th, the first part of that week, on a Tuesday, I believe. I believe it was around the 19th.

***

Q: Who was the DEA agent?

A: I think it was Pyla. I'm not sure. Hank Pyla.

Q: Alright, when they picked up the tapes, did you have any conversation with those people?

A: When they picked up the tapes?

Q: Yes.

A: No. They just wanted the tapes, and I talked to them about seeing to get a dog into the airport for Orta.

Q: You knew—Isn't it correct that you knew on the 19th when they picked up the tapes that Orta was picking up a big load of marijuana?

A: Yes. He was supposed to be going to Texas to pick up a load. Yes, sir.

Q: You knew that from the tape, isn't that correct?

A: Yes, sir.

Q: And you told them of that when they picked up the tapes?

A: Yes, sir.

***

Q: But he, to your knowledge, he was going to pick up a load and bring it back in the area?

A: Yes, sir.

Q: And you told the FBI that and you told the DEA Agent, Pyla, that?

A: Yes, sir.

Q: Did they ask you where you got the information? They knew it had come from the tape, didn't they?

A: I would suspect they did, but they didn't want any information that had come off the, anything with the phone—

Q: But you volunteered—you told them he was bringing in a load and to have the dogs at the airport waiting for him.

A: Yes.

Witness: Henry D. Pyla
(DEA Agent)

Tr.II 98-99

Q: Isn't it a fact, Mr. Pyla, that you, from the time you got there were actually directing this surveillance and arrest?

A: I would say so. I was directing the surveillance.

***

Q: You've been with the, with the Bureau of Narcotics or DEA now for 20 years?

A: Yes, sir.

Q: Do you have an opinion of the legality of the arrest of Rey Orta? You don't know?

A: No. I don't have an opinion.

Q: Wasn't basically the information that you had secured through the illegal tap is what lead to the arrest of Orta?

A: The knowledge—

MR. DOWD [Assistant U.S. Attorney]: Your Honor, I'm going to object to that. He's asking him to draw a legal conclusion which is really a question for the Court.

THE COURT: I'll sustain the objection.

APPENDIX H

(This document and the attachments were not provided to petitioner until after he was convicted)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-219-CR(C)

United States of America,
Plaintiff,

v.

Harold G. White,
Defendant.

AFFIDAVIT OF EDWARD L. DOWD, JR.

Comes now Edward L. Dowd, Jr., and being duly sworn states as follows:

On April 18, 1983, this affiant learned from Special Agent John Zienter and Special Agent Henry Pyla of the Drug Enforcement Administration, that electronic surveillance had been conducted on Rey Orta by officers of the Palmyra Police Department and the Missouri State Highway Patrol. This electronic surveillance was conducted without court authorization and without the consent of any party to the conversations which were intercepted. Agents Zienter and Pyla advised this affiant that they learned these facts from an officer of the Highway Patrol on April 15, 1983. These agents had learned from Major Fisher of the Missouri State Highway Patrol that during the electronic surveillance conversations between Rey Orta and Sheriff Harold G. White of Marion County, Missouri, were intercepted.

This affiant notified United States Attorney Thomas E. Dittmeier of this situation and on April 19, 1983, this affiant met

with Major Fisher of the Missouri Highway Patrol, the Federal Bureau of Investigation and the Drug Enforcement Administration. Major Fisher told this affiant that Rey Orta was a drug dealer in Marion County. He stated that five Palmyra policemen and two highway patrolmen had conducted unauthorized electronic surveillance on Orta's telephone during which they had overheard Sheriff White call and talk to Orta, warning him that the heat was on. Prosecuting Attorney Warren Wells was then advised of this wire tap and he contacted Sheriff White and he told him that a search warrant would be executed on Orta's house the following morning. The law enforcement personnel conducting the electronic surveillance then intercepted a telephone call from White to Orta advising Orta that a search warrant would be executed at Orta's house.

Major Fisher advised that as soon as he became aware of the wire tap, he ordered it to be terminated.

At this meeting, it was agreed that the Federal Bureau of Investigation would conduct an investigation of this apparent unlawful electronic surveillance. During the investigation conducted by the Federal Bureau of Investigation, the tape recordings of the unlawfully intercepted conversations were provided to the Federal Bureau of Investigation by Prosecuting Attorney Warren Wells. These tapes have remained in the exclusive care, custody and control of the Federal Bureau of Investigation since that time and no copy of the tape recordings have been made or disseminated to anyone.

At this meeting it was also agreed that the Drug Enforcement Administration would investigate the allegations against Rey Orta and Sheriff Harold White.

The Grand Jury investigation of Sheriff White was conducted by this affiant and First Assistant United States Attorney Terry I. Adelman. Neither this affiant nor Terry I. Adelman have

ever listened to these tape recordings. Furthermore, agents of the Federal Bureau of Investigation have informed this affiant that they have not listened to the tape recordings nor made transcripts of the recordings. Agents of the Drug Enforcement Administration have informed this affiant that they have not reviewed these tape recordings.

This affiant is prepared to present evidence to this Court that the evidence resulting in the indictment of Sheriff Harold G. White was gathered through a source independent of any evidence obtained by the recordings made by the Palmyra Police Department and the Highway Patrol.

This affiant has instructed Supervisory Special Agent Michael Hagan, of the Federal Bureau of Investigation, to provide a copy of the report of investigation compiled by the Federal Bureau of Investigation, as well as the tape recordings provided to the Federal Bureau of Investigation during their investigation, to this Court.

Also provided to this Court is the Grand Jury transcript where the Government refers to illegally obtained evidence and instructs the Grand Jury not to consider that fact in any way in its investigation. Also provided to this Court is the Drug Enforcement Administration report containing reference to the wire tap.

Further, this affiant sayeth naught.

Edward L. Dowd, Jr.

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

Subscribed and sworn to before me this _____ day of November 1983.

Notary Public

My commission expires:

APPENDIX I

Grand Jury transcript excerpts of statements by Edward L. Dowd, Jr. (These excerpts are undated and were not provided to petitioner until after he was convicted.)

Excerpt 1:

Question to Timothy Brunholtz, DEA Agent

A JUROR: At the beginning of your testimony here today you indicated you were conducting a surveillance on Mr. Orta and then this Sheriff White thing kind of fell into that.

Why were you surveilling Mr. White at that time?

MR. DOWD: Tim, I think I better answer that after you leave, if that's all right with you.

A JUROR: Okay.

A JUROR: Are there any other questions?

(No response.)

MR. DOWD: Thanks, Tim.

(Witness excused.)

MR. DOWD: There was a question by one of the grand jurors, and the witness has been excused from the room.

There was some illegally obtained evidence obtained by the Palmyra Police Department and the Highway Patrol in this case, which is how our office and the Drug Enforcement Administration became involved in the first place; and I don't want to get involved in the illegal evidence here. It will not be used at trial and shouldn't play any part in your consideration of this case either. Okay?

They had investigated Orta in the past, DEA had.

Excerpt 2:

A JUROR: Did they suspect Sheriff White long before Orta was picked up, or did it just start at the time of his arrest?

MR. DOWD: Well, you will recall Sheriff White's testimony about Warren Wells testing him so there were some suspicions.

I really can't go into it because I have mentioned before in this case there were some illegally seized evidence and I can't go into that. I don't want you to decide this case based on that either.

A JUROR: But the allegations against Sheriff White actually started after Orta told his story?

MR. DOWD: There were suspicions before that, and that's why, as Sheriff White told you, Wells was calling him and testing him.

A JUROR: And also White was—or Orta was bugged when he went out—of course, that was after he was arrested.

MR. DOWD: That's right. But then White basically was confirming everything that Orta said.

A JUROR: What started this, how did they get an idea that White was—

MR. DOWD: It started with illegal evidence, illegally seized evidence, and that's going to be an issue, assuming that an indictment is returned, that will be an issue that will be taken up prior to trial, but I really don't want to get into the illegally seized evidence because I don't want you to base your decision on that either. I don't want you to consider that in any way—

A JUROR: You mean illegally seized drugs?

MR. DOWD: —and that's why we sent DEA out to get Orta, and we got Orta. It was what we expected to hear.

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MAR 14 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1020

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROLD G. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

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14 pp

QUESTIONS PRESENTED

1. Whether the testimony of a witness was the direct result of an illegal wiretap.

2. Whether the district court should have dismissed the indictment because evidence derived from an illegal wiretap was presented to the grand jury.

3. Whether the prosecutor was required to notify petitioner of the illegal wiretap before his grand jury appearances.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App A1-A4) and the district court (Pet. App. A7-A12) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1984. A petition for rehearing was denied on November 14, 1984 (Pet. App. A5). The petition for a writ of certiorari was filed on December 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of conspiring to distribute marijuana, in violation of 21 U.S.C. 846 and 841(a)(1), and two counts of perjury before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to consecutive terms of five years' imprisonment on the conspiracy count and on one of the

perjury counts, with imposition of sentence on the second perjury count suspended in favor of a five-year period of probation. The court of appeals affirmed (Pet. App. A1-A4).

1. The evidence revealed that petitioner, the former Sheriff of Marion County, Missouri, conspired with Rey Orta to distribute marijuana. Petitioner's role in the conspiracy was to impede any investigations directed against Orta. For his efforts, petitioner received regular payoffs from Orta, who was the principal government witness at petitioner's trial.

From April 2-15, 1983, Orta's telephone was tapped illegally by state and local police officers. The wiretap confirmed that Orta was selling marijuana, and it also resulted in the unanticipated interception of a call from petitioner to Orta. During that call, petitioner, who did not know about the wiretap, warned Orta that state and local law enforcement officers had him under surveillance. Pet. App. A2, A30.

At that point, one of the local officers involved in setting up the illegal wiretap informed Warren Wells, the prosecuting attorney for the county, of the existence of the wiretap and the intercepted call between petitioner and Orta. Wells, who did not know that the wiretap violated federal law, called petitioner that evening and told him that a search warrant for Orta's home would be issued the next day. No search was in fact planned, but Wells made the call to see if petitioner would pass the information on to Orta. The next day, petitioner did indeed call Orta and warn him that it was "mayday," and that a search warrant would be executed at his home. Pet. App. A7-A8, A18.

On April 12, 1983, Major Fisher of the Missouri Highway Patrol learned of the illegal wiretap and ordered it stopped immediately. He also advised the DEA and the FBI

of the illegal wiretap, Orta's drug dealings, and petitioner's conspiracy with Orta. The upshot of these consultations was a decision that the FBI would investigate the illegal wiretapping, taking possession of and sealing all of the illegally obtained tapes, and the DEA would begin an intensive investigation of Orta, independent of any information obtained from the wiretap. Pet. App. A2, A8.[1]

While the FBI was investigating the illegal wiretapping, the DEA had Orta's home under surveillance. DEA's supervisory agent knew of the prior illegal wiretap, but DEA Agent Timothy Brunholtz, who was in charge of the investigation of Orta, did not know of the wiretap or of petitioner's involvement with Orta. Pet. App. A2. On April 20, 1983, DEA agents observed Orta (who had just returned from Texas) coming and going from his residence and meeting various people for what appeared to be drug transactions. The DEA agents also saw Orta transfer two large bags from his car to a van in a city park. The DEA agents, believing that Orta had just transferred drugs, stopped the van, the car, and Orta. A search of the van revealed 20 pounds of marijuana in the bags. *Id.* at A2-A3.

Agent Brunholtz arrested Orta, read him his *Miranda* rights, and, in keeping with his usual practice, asked Orta if he would cooperate with the authorities. Orta said that he had useful information but that he would provide it only if he was not prosecuted. Later that evening, the United States Attorney decided not to prosecute Orta in exchange for information concerning Orta's drug suppliers and petitioner. Pet. App. A3.

---

[1]As the district court noted, Orta was no stranger to the DEA even before the illegal wiretapping. The district court observed that the "DEA knew of Orta a year and a half prior to April, 1983. Investigation was begun as early as April, 1982" (Pet. App. A9).

2. Orta was the government's principal witness at petitioner's trial. Both the district court and the court of appeals rejected petitioner's contention that the indictment and Orta's testimony were a direct result of the illegal wiretap. Both courts found that Orta's decision to testify was the product of his own free will, resulting from his arrest as he was committing a crime. The courts further held that the DEA's investigation of Orta, and subsequent development of evidence against petitioner, derived from sources independent of the illegal wiretap. Accordingly, the courts refused to dismiss the indictment and held that Orta's testimony had been properly admitted. Pet. App. A4, A9-A12.

The court of appeals also summarily rejected petitioner's claims that the government had a duty to disclose the existence of the illegal wiretap prior to petitioner's grand jury appearances, that the government had disclosed information obtained from the wiretap to the grand jury, and that petitioner's perjured statements to the grand jury were not material and relevant to its investigation (Pet. App. A4).

ARGUMENT

1. Petitioner contends (Pet. 10-15) that Orta's testimony against petitioner was derived from the illegal wiretapping of Orta's telephone and therefore should have been suppressed. The courts below correctly rejected this contention.

A prior illegality — here, the tapping of Orta's telephone — does not call for invocation of the exclusionary rule when the evidence in question was acquired through a source independent of any violation of the defendant's rights or by means sufficiently distinguishable to be purged of the primary taint. See, *e.g., Segura* v. *United States,* No. 82-5298 (July 5, 1984), slip op. 8; *Brown* v. *Illinois,* 422 U.S. 590, 599 (1975); *Wong Sun* v. *United States,* 371 U.S. 471 (1963). Among the relevant factors in determining whether a witness's trial testimony was the direct result of improper

police action are the witness's willingness to testify, the significance of the illegality in securing the testimony, the proximity between the illegality and the witness's decision to cooperate with the authorities, and the police motivation in conducting the illegal search. *United States* v. *Ceccolini,* 435 U.S. 268, 276-279 (1978).

Applying these factors to the instant case, it is clear that Orta's testimony was properly admitted. In order to obtain suppression of that testimony, petitioner would have to demonstrate that it was produced by a violation of his rights, not merely Orta's. While it is true that two of petitioner's conversations were unlawfully intercepted, it is beyond serious dispute that Orta's eventual cooperation cannot be ascribed to that violation of petitioner's rights. First, Orta's identity as a suspected drug dealer was known to both state and federal authorities long before the illegal wiretap. See Pet. App. A9-A10; *Ceccolini,* 435 U.S. at 279. Second, Orta's decision to cooperate with the authorities resulted from his valid arrest on charges of distributing marijuana. During the arrest and the negotiations to secure his testimony, the authorities never mentioned the illegal wiretap. Indeed, the fact that Orta decided to cooperate only after he had received a promise of immunity establishes that he acted out of concern for his own self-interest, based on an assessment of his own situation. Finally, the illegal wiretap (of which Orta was completely unaware) was initiated to obtain evidence regarding Orta, not petitioner. The unanticipated interception of petitioner's first call to Orta played no part in the decision to tap Orta's telephone. Thus, Orta's testimony was completely independent of the illegal wiretap, and it was properly admitted. See *United States* v. *Schaefer,* 691 F.2d 639, 644-645 (3rd Cir. 1982); *United States* v. *Hooton,* 662 F.2d 628, 631-633 (9th Cir.

1981), cert. denied, 455 U.S. 1004 (1982); *United States* v. *Leonardi*, 623 F.2d 746, 751-754 (2d Cir.), cert. denied, 447 U.S. 928 (1980).[2]

2. Petitioner also contends (Pet. 15-16) that the district court should have dismissed the indictment on the ground that evidence derived from the illegal wiretap was presented to the grand jury in violation of 18 U.S.C. 2515.[3] Petitioner has offered no reason to review the court of appeals' conclusion (Pet. App. A4) that the government did not disclose any information obtained from the wiretap to the grand jury.

The intercepted conversations between petitioner and Orta were never given to the grand jury, but references to prosecutor Wells' fake search warrant plan (see page 2, *supra*) were. Donald Campbell, petitioner's deputy sheriff, was subpoened before the grand jury. He voluntarily brought with him a report prepared by petitioner that purported to be petitioner's investigation of Orta.[4] Included in

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[2]Orta's testimony also could have been admitted under the inevitable discovery doctrine. See *Nix* v. *Williams*, No. 82-1651 (June 11, 1984). As the district court stated after observing that the DEA knew of Orta long before the illegal wiretap (Pet. App. A9-A10):

> Not only is it likely that the government would have launched its own investigation and found Orta, even if no information had been received from the illegal wiretap, but it is clear that the government had actually been investigating Orta and in all likelihood would have continued the investigation since, as [petitioner] states, Rey Orta was known to all law enforcement agencies as a heavy drug runner.
>
> In this case, it was shown that the government already knew of Orta and was trying to catch him; therefore, he was already targeted as a source of possible information.

[3]Section 2515 provides that no evidence obtained through an illegal wiretap "may be received in evidence * * * before any * * * grand jury."

[4]Petitioner's defense at trial was that he was conducting his own investigation of drug dealing in his county and that his contacts with Orta were in furtherance of that investigation.

the report were references to the fake search warrant plan and petitioner's claim that he had alerted Orta about the plan because he thought prosecutor Wells was "testing" him and that Wells might be involved with Orta. Before the grand jury, petitioner and Orta were questioned about the information in the report, but without any reference to the wiretaps (GX 11, at 8-14; GX 17, at 28-29). It is thus clear that whatever information the grand jury heard about the fake search warrant plan was the result of Campbell's voluntary decision to produce petitioner's "report," and not the result, direct or indirect, of the use of illegally-obtained wiretap evidence.[5]

In any event, petitioner cites no authority for the proposition that dismissal of the indictment is a proper remedy for a violation of 18 U.S.C. 2515. This omission is not suprising because the statute provides otherwise; Section 2518(10)(a) states that suppression of the evidence is the statutory remedy for violations of Section 2515. Thus, petitioner had no right to dismissal of the indictment.

---

[5]The indictment against petitioner listed three overt acts based on the fake search warrant plan. On petitioner's motion, the district court struck all references to the fake search warrant plan from the indictment and prohibited the prosecutor from introducing that evidence at trial (Pet. App. A13-A18). The district court's order was probably overly generous to petitioner because the evidence of the fake search warrant scheme was introduced to the grand jury through petitioner's own report. Since petitioner voluntarily prepared the report and gave it to his deputy, it was untainted by the illegal wiretap.

We note also that Section 2515's ban on the use of evidence derived from an unlawful wiretap would not, in any event, justify the exclusion of Orta's testimony before the grand jury. Section 2515 incorporates the attenuation analysis developed in Fourth Amendment jurisprudence. See S. Rep. 1097, 90th Cong., 2d Sess. 96 (1968). As we have demonstrated earlier, Orta's testimony was not a fruit of the illegal wiretap, and certainly not the fruit of the overhearing of two of petitioner's conversations during the course of the wiretap.

3. Finally, petitioner contends (Pet. 16-18) that the government was obligated to notify him of the illegal wiretap prior to his grand jury appearances. This contention is wholly without merit.

The applicable statute, 18 U.S.C. 3504, does not require the government to inform a grand jury witness of the existence of an illegal interception in the absence of a motion to that effect filed by the witness. See *United States* v. *Nabors*, 707 F.2d 1294, 1301-1302 (5th Cir. 1983), cert. denied, No. 83-552 (Feb. 21, 1984); *In re Baker*, 680 F.2d 721 (11th Cir. 1982). Petitioner never asserted that his conversations had been intercepted, and he therefore had no right to disclosure from the government of the illegal wiretap.[6]

Petitioner's argument (Pet. 17) that he was entitled to notice of the wiretap by virtue of the inventory provisions of 18 U.S.C. 2518(8)(d) is frivolous. That provision is part of a comprehensive set of procedures established for emergency and court-authorized wire and oral interceptions. It simply does not address the situation of the wholly unauthorized wiretap at issue in this case. Moreover, the suppression remedy of Section 2518(10)(a) does not apply to violations of Section 2518(8)(d). *United States* v. *Donovan*, 429 U.S. 413 (1977).

---

[6]Nor could there be any basis in this case for a claim that petitioner was unable to file the proper motion because he was totally unaware of the wiretap. Petitioner, in his dealings with Orta, had told him that "they've got a listening device — they're on you all the time — three State boys." Petitioner further told Orta that "I'm going to tell you exactly what's happening — you're being watched and records are being made." GX 2. Whether or not these statements definitively show that petitioner knew of the wiretap, they at least demonstrate sufficient suspicion on his part to negate any possible excuse for not filing the motion required by 18 U.S.C. 3504.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

MARCH 1985

DOJ-1985-03